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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 313

L. B. BENIOR, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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INDEX OF CITATIONS

Cases:	Page
Achilli v. United States, 353 U.S. 373 (1957)	1, 2, 4, 5, 7, 8, 9, 10
Berra v. United States, 351 U.S. 131	1, 4
Ex Parte Collett, 337 U.S. 55, 61	7
The Distilled Spirits, 11 Wall. 356	7
Fabbri v. Murphy, 95 U.S. 191, 196	7
Lewyt Corp. v. Commissioner, 349 U.S. 237, 249 (1955)	11
Massachusetts Bonding and Insurance Co. v. United States, 352 U.S. 128, 138 (1956)	6
Rosenberg v. United States, 346 U.S. 289 (1953)	9
Sandberg v. McDonald, 248 U.S. 185, 200 (1918)	3
United States v. Aluminum Co. of America, 148 F. 2d 416, 429 (C.C.A. 2d 1945)	11
United States v. Barnes, 222 U.S. 513, 520	8
United States v. Beacon Brass Co., 344 U.S. 43	6
United States v. Leslie Salt Co., 350 U.S. 383 (1956)	5
United States v. Noveck, 273 U.S. 202 (1927)	2, 3, 8
Wood v. United States, 16 Pet. 341, 363	7

Statutes:	
Act of June 30, 1864, c. 173, 13 Stat. 223:	
Sec. 15	3
Act of Feb. 24, 1919, c. 18, 40 Stat. 1057:	
Sec. 253	2, 3, 8, 10
Internal Revenue Code of 1939:	
Sec. 145(b)	2, 4, 5, 6, 8, 11
[illegible]	6
Sec. 3616(a)	2, 4, 5, 6, 8, 11
Internal Revenue Code of 1954:	
Sec. 7207	2, 6, 11
United States Code:	
19 U.S.C. § 1591	6
26 U.S.C. § 1250-1253	6
26 U.S.C. § 1904	6
Revised Statutes:	
Sec. 3179	2, 3, 4, 5, 8, 10, 11

MISCELLANEOUS:

Page

Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says," 8 F.D.R. 121 (1949) . . . 7
Rochner on Federal Taxation, Par. 157, p. 179 9
1 Sutherland Statutory Construction, Secs. 2035, 2036 (3rd ed. 1943) 11

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Petitioner agrees with the government's contention that the instant case is presently governed by *Achilli* v. *United States*, 353 U.S. 373 (1957)—but respectfully submits that the *Achilli* decision was wrong and in conflict with an opinion of this Court rendered last year, *Berra* v. *United States*, 351 U.S. 131, as well as with prior judicial decisions by this Court and

limits the application of an Internal Revenue Statute to so narrow a scope as to make it inefficacious.

The genesis of §3616(a) has already been rather fully discussed in the petition for writ of certiorari; however, it is suggested that the *Achilli* decision is based on several inconsistencies and inaccurate premises not heretofore brought to the Court's attention.

1. This Court stated that as long ago as 1926 it had been the government's position that the predecessor of §145(b) effectively repealed §3616(a)'s applicability to income tax evasion, citing brief for the United States, pages 16 to 19, in *United States* v. *Norcek*, 273 U.S. 202 (1927). However, it should be noted that the issue before the Court in the *Norcek* case did not concern R.S. §3179 (the predecessor of §3616(a)). In that case, defendant was charged with and convicted of perjury in making returns for the purpose of taxation under §125 of the criminal code. He defended on the grounds that §125 had been repealed so far as concerns perjury on tax returns by §253 of the Revenue Act of 1918 (re-enacted as §253 of the Revenue Act of 1921), which made it an offense to attempt wilfully in any manner to defeat or evade a tax. (This section is a forerunner of §145(b)). In effect, the defendant's argument in the *Norcek* case was identical with the government's argument accepted by the majority of the Court in the *Achilli* decision. The government, in its brief, traced the derivation of §253; it contended that even if the Revenue Acts of 1916, 1917, 1918, 1921, 1924 and 1926, by making more particular provision against false returns than R.S. §3179, repealed that section *pro tanto*, that they effected no further repeal, and that they did not repeal §125.

The government, in the *Noyeck* brief (1926), conceded that, "§ 15 of the Act of June 3, 1864 (Filing False Returns) was carried into the revised statutes as § 3179. It is still in force as noted by the editors of Compiled Statutes (6 Comp. Stat., Sec. 5901) and Federal Statutes Annotated (3 Fed. Stat. Ann. 2d Ed., p. 1009)". (Page 14) Noyeck, the defendant, argued that since perjury amounted to an attempt to defeat or evade the tax there was also a repeal, *pro tanto*, by "§ 253", arguing that since § 253 provided that whoever defeats or evades "in any manner" is guilty, Congress intended to embrace within the provisions of § 253 of the Revenue Act *all methods* of defeating or evading the income tax. But this reasoning was rejected. Justice Brandeis, speaking for the Court, held that the offenses of perjury and of attempting to evade income taxes by filing false statements are not identical, even when they arise out of the same transaction or act. "Each involves an element not found in the other." *United States* v. *Noyeck*, *supra*, at 296. Justice Brandeis did not specifically mention R.S. § 3179, although he *rejected* the idea that § 125 had been repealed *pro tanto* by § 253, concluding, "There is nothing in the history of the revenue legislation which should lead us to a different conclusion."[6] It is obvious that Justice Brandeis would have similarly rejected the government's contention that § 253 had repealed *pro tanto* R.S. § 3179.

[6] In *Sandberg* v. *McDonald*, 248 U.S. 185, 201 (1918), Justice McKenna, who joined by Holmes, Brandeis and Clarke, wrote a dissent, stated that the Court was not "called upon to assign the genesis of the policy or trace the evolution of its remedy. . . ." "Ours is the simple service of interpretation and there is no reason to hesitate in its exercise because of supposed consequences."

Regardless of the government's position in 1926, the *Achilli* decision neglects to consider less remote history—the *Berra* case—in which the defendant contended, the government conceded,[2] and Justice Harlan assumed *arguendo* that § 3616(a) is applicable to income tax returns. *Berra* v. *United States*, *supra*, at 133. Furthermore, the *Achilli* decision recognizes that during the last five years the government has prosecuted a great many taxpayers under § 3616(a), but explains that the government for the first time has made a detailed survey of the problem of alleged overlapping between § 3616(a) and § 145(b). If the government is not embarrassed by these convictions during the past five years, perhaps it ought to disclose and explain the number of income tax prosecutions not only under § 3616(a) *since the 1939 code* by informations and indictments but the prosecutions under R.S. § 3179 *during the period 1913 to 1939*, although

[2] The government in its brief in the *Berra* case stated, at p. 24 n. 9, as follows:

> "We agree with petitioner, contrary to the court below (see Dillon v. United States, 218 F. 2d 97, 103), that Section 3616(a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616(a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285); and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. Ex parte Cohen, 191 F. 2d 309 (C.A. 9), certiorari denied, 342 U.S. 947; Taylor v. United States, 179 F. 2d 640, 643-644 (C.A. 9); Kirsch v. United States, 174 F. 2d 595, 597-598 (C.A. 8); Slick v. United States, 1 F. 2d 897 (C.A. 7); Ex parte Berkoff, 65 F. Supp. 976, 979-981 (D. Minn.); United States v. Koppelman, 81 F. Supp. 1007, 1008-1009 (M.D. Pa.); United States v. Benz, 24 Fed. Cas. No. 14,576 (N.D. Ill.) see also 10 Mertens, Law of Federal Income Taxation, Sec. 55.66."

the Court now states R.S. § 3179 had been impliedly repealed as to the income tax, and that § 3616(a) never did apply to income tax. Obviously Congress and the Internal Revenue were aware of these criminal prosecutions before the passage of § 3616(a) and § 7207. See *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956).

2. The Court declares in the *Achilli* case that the evolution of §§ 145(a) and 145(b) "makes clear that by the time the unconfined language of § 3179 became § 3616(a) of the 1939 code, its scope had been shrunk by a series of specific enactments that had the potency of implied repeals." However, the Court does not state what still lies within the scope of § 3616(a). If the Court is correct as to § 3616(a)'s miniscule scope, Congress would not have written the section into the 1939 code under "Subtitle D, General Administrative Provisions; Chapter 34, Information and Returns; Subchapter B, Determination of Tax Liability" and, by its terms, made it applicable to ". . . *any* false or fraudulent list, *return*, account, or statement, with intent to defeat or evade the valuation, enumeration or assessment . . . ." If the Court's contention is correct, then the use of the words "list, count, statement, valuation and enumeration" are surplusage as applied to the two or three taxes to which the government explains this Act only applies, since none require the filing of lists, accounts or statements, or involve valuation and enumeration.[3]

[3] It simply can not be believed that Congress re-enacted a law in 1939, as suggested by the government in its brief in *Achilli* v. *United States* at page 28 to apply "to only three taxes, for which there appeared to be no evasion or false returns provisions in the acts themselves: (1) the excise tax on certain fish, animal and vegetable oils (26 U.S.C. 2490-2494); (2) the tax on the average amount of circulation issued by certain banks (26 U.S.C.

Since § 145(b) applies to any attempt to evade any tax imposed, then accepting the government's *ad hoc* contention there would be no necessity for the existence of § 3616(a), since filing a false return is an attempt. But Congress believed there was a need for having a statute that punished filing a false return, because it re-enacted § 3616(a) as § 7207 in the Internal Revenue Code of 1954.

In *United States* v. *Beacon Brass Co.*, 344 U.S. 43, the government argued that a single act or transaction may violate two or more statutes and that being dis-

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1900-1907); and (3) the excise tax on certain transfers of stock or securities to avoid income tax (26 U.S.C. 1250-1253, note particularly Sec. 1253(c)). The existence of these three areas of applicability, areas in which without Sec. n 3616 there would apparently have been no criminal sanction available within the internal revenue laws, indicates that Congress intended the section to be effective as a residual provision covering offenses for which no other sanction was provided." The government could not conceive of Congress enacting a criminal statute which covered no offense, hence this "theory" of Congress' intention. And unfortunately, "a theory survives long after its brains are knocked out." Frankfurter, J., dissenting in *Massachusetts Bonding and Ins. Co.* v. *United States*, 352 U.S. 128, 138 (1956). This theory to explain the existence of § 3616 is *completely demolished* by the actual statutes on the record. § 2493 provides that the fish oil tax should be collected in the same maaner as a duty imposed by the Tariff Act of 1930, and should be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by this Act with certain exceptions, not here material. § 591 of the Tariff Act, 19 U.S.C. § 1591, provides penalties for its evasion similar to those provided for evasion of the income tax. There is, therefore, *specific* legislation dealing with evasion of the fish oil tax. 26 U.S.C. § 1904 states a specific penalty for a refusal or neglect to make a return or payment, besides additional penalties provided in other cases. 26 U.S.C. § 1250-1253, dealing with tax on transfers to avoid income tax, specifically states that all administrative provisions of the law relating to the assessment of taxes shall apply. And there has never been any criminal prosecutions under § 3616(a) or § 7207 for these three taxes.

tinct, each of the statutes is to be enforced as it was written. This argument fully applies in the instant case. Where doubt exists respecting the meaning of a statute the legislative history may be taken into consideration in resolving the doubt; but where the language used is clear, there is no need to refer to prior legislative history.

In *Ex Parte Collett*, 337 U.S. 55, 61, this Court stated:

> "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco, Inc. v. Walling, 324 US 244, 260, 89 L ed 921, 933, 65 S Ct 605 (1945). This canon of construction has received consistent adherence in our decisions."

The cases cited in the footnote show that the rule as to statutory revisions is the same. Clearly, the *Achilli* decision is in conflict with this Court's decisions dealing with interpretations of statutes. See Justice Jackson, "The Meaning of Statutes: What Congress Says or What the Court Says," 8 F.R.D. 121 (1949).

3. The well-settled rule that repeals by implication are not favored applies nowhere with greater force than in internal revenue laws. *Fabbri* v. *Murphy*, 95 U.S. 191, 196. It is a very common thing for cumulative remedies or penalties to be provided in laws concerning the revenue and its collection (*The Distilled Spirits*, 11 Wall. 356), and as stated by Mr. Justice Story as early as 1842 in *Wood* v. *United States*, 16 Pet. 341, 363—

> "The more natural, if not the necessary inference in all the cases is that the legislature intends the new laws to be auxiliary to, and in aid of the purposes of, the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the later laws abrogated and were designed to abrogate the former."

And in *United States* v. *Barnes*, 222 U.S. 513, 520, this Court quoted with approval the above language of Mr. Justice Story. Clearly, there is no total repugnancy between § 145(b) and § 3616(a). Those statutes can be given operation without conflict. A person may *attempt* to evade taxes by filing a false return or he may merely file a false return. One offense involves an attempt to evade, the other does not.

In its brief in the *Novreck* case (pages 18 and 19), the government argued that Congress did not intend R.S. § 3179 to change the long-standing policy of treating perjury in a tax return as an offense additional to that of filing a false return, and that the acts modeled on R.S. § 3179 (including § 253 of the 1918 Revenue Act) did not carry that intent. Thus, the government said, a broad section which penalizes wilful attempts to evade taxation and which could embrace the filing of perjured returns, did not repeal the specific offense of perjury. However, the government did an about-face in *Achilli* and urged that the offense of attempting to wilfully evade income taxes which could embrace the filing of false returns impliedly repealed a specific penalty for filing of false returns. Even if the government, like a woman, is

entitled to change its mind, this Court should not yield so easily.

The broadening of the doctrine of implied repeal resulting from the *Achilli* opinion may well endanger other time-honored statutes, and even our national security. Only a few years ago the same argument was rejected by the Court, even though it meant the carrying out of a death sentence. *Rosenberg* v. *United States*, 346 U.S. 289. (1953). Justice Jackson concluded that the Atomic Energy Act of 1946 did not repeal the Espionage Act of 1917 because "it does not purport to repeal the earlier Act, nor afford any grounds for spelling out a repeal by implication. Each Act is complete in itself and has its own reason for existence and field of operation." *Id*, at 290. Justice Clark added, "nor can the partial overlap of two statutes work a *pro tanto* repealer of the earlier Act." *Id*, at 294. Justice Frankfurter dissented, not from this principle, but on the ground that the Court had insufficient time to examine the legislative history of these Acts to determine whether the later Act did repeal the earlier. *Id*, at 307.

Yet, the majority of this Court in *Achilli* adopted the government's argument which contradicted its own conduct, numerous court decisions, and in plain disregard of the literal words of a statute, simply on the basis of an inconsistency in penalties for different types of offenses.

Rochner on Federal Taxation, ¶ 157, p. 179 (June 14, 1957), commenting on the *Achilli* decision, stated:

> "It is interesting that Mr. Justice Frankfurter should be assigned the majority opinion, which by implied repeal of § 3616(a) placed the crime ex-

clusively under § 145(b), when we consider what he said in his Cardozo lecture, 'Some Reflections on the Reading of Statutes', 47 *Col. L. Rev.* at 545-6 (May, 1947):

> 'Above all, they [legislatures] must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words.'

4. The majority opinion concluded that R.S. § 3179 was repealed *pro tanto* as to the income tax by § II(f) of the Revenue Act of 1913, which prescribed a heavier penalty for the making of a false return with intent to evade the income tax than R.S. § 3179's penalty for making any false return. The majority was of the opinion that this conclusion is strengthened by the continued heavier penalties imposed by the 1916 and 1917 Acts. Having strained the doctrine of implied repeal by resting upon this slender reed, the Court suggested that Congress would not have inexplicably reversed itself in the 1918 Act by failing to mention in § 253 the making of false returns as a means of evasion proscribed by that section. It is obvious that this omission is an "inexplicable reversal" *only* if Congress intended in 1913 to repeal *pro tanto* R.S. § 3179. It is logical that Congress spoke economically in 1918 (when it neglected to enumerate the making of a false return as a means of evasion proscribed by § 253) because it considered R. S. § 3179 as applicable to income taxes, rather than because it considered the subject of making false returns as having been covered by the penalty for wilful attempts in any manner to evade the income tax. Furthermore, as

Justice Frankfurter has noted in another case, "Revenue laws are notoriously not expressions of an ordered system of reason and fairness." *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 249 (1955) (dissent).

5. But assuming arguendo that the 1913 Revenue Act did repeal *pro tanto* R.S. §3179, which admittedly applied to income taxes between 1864 and 1913, the majority opinion in the *Achilli* case still neglected to explain the significance and purpose of the 1939 codification, which *reintroduced*, the language of R.S §3179 as §3616(a). The inclusion and position of §3616(a) in the Internal Revenue Code indicated that *Congress considered §3616(a) as an instrument for criminally enforcing the income tax*, and, therefore, overrides any implied repeal before 1939. 1 SUTHERLAND STATUTORY CONSTRUCTION, §§ 2035, 2036 (3d ed. 1943). In the same chapter as § 3616(a), § 3612(d) deals *civilly* with additions to the tax cases of failure to file or false returns.

If the Court *looks* at the latter statute, "considered to throw a cross light" upon the earlier enactment (*United States* v. *Aluminum Co. of Amer.*, 148 F. 2d 416, 429 (C.C.A. 2d 1945)), §7207 of the Internal Revenue Act of 1954, the successor of § 3616(a), as the Tables of the Internal Revenue Code and its legislative history clearly indicate, the theory that §3616(a) had atrophied and no longer applied to income taxes is met by the cold fact that Congress said it did apply in 1939 to income taxes, Congress said it did apply in 1954 to income taxes. The only change in the 1954 Act made by Congress was to eliminate the requirement of an "intent to defeat or evade", which removed the overlap with §7201 of the 1954 Code, formerly §145(b) of the 1939 Act.

This Court has given these Internal Revenue Acts a construction which now limits its application to precisely nothing until this Court recognizes that Congress did not have a futile purpose in their enactment.

For the foregoing additional reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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